STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TRAVIS UNIFIED TEACHERS ASSOCIATION,	)	
Charging Party,	)	Case No. SF-CE-1307
v.	)	PERB Decision No. 917
TRAVIS UNIFIED SCHOOL DISTRICT,	)	January 3, 1992
Respondent.	)	

Appearances: California Teachers Association by Ramon E. Romero, Attorney, for Travis Unified Teachers Association; Littler, Mendelson, Fastiff & Tichy by Victor J. James, II, Attorney, for Travis Unified School District.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Travis Unified School District (District) to a proposed decision (attached) of a PERB administrative law judge (ALJ). The ALJ found that the District violated section 3543.5(b), (c) and (e) of the Educational Employment Relations Act (EERA)[1] by insisting up to

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

and through impasse on restrictions that would bar the Travis Unified Teachers Association (Association) from filing grievances in its own name.

The Board has reviewed the entire record in this case, including the stipulated record, proposed decision, District's exceptions and the Association's responses thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.[2]

DISTRICT'S EXCEPTIONS

On appeal, the District filed exceptions to the proposed decision, claiming that: (1) PERB erroneously concluded, as a matter of law, that an exclusive representative has a statutory right to file grievances in its own name, and that this is a nonmandatory subject of bargaining; and (2) the ALJ erroneously found that the District insisted to impasse on waiver of the Association's right to grieve, as the Association did not, prior to impasse, put the District on notice that it would not bargain over the grievance proposal.

(e) Refuse to participate in good faith in the impasse procedure set forth in Article *9* (commencing with Section 3548).

[2]The Board finds that the ALJ properly granted the Association's motion to amend the complaint and therefore finds it unnecessary to discuss the basis for the ALJ's authority to amend the complaint during the hearing process. Accordingly, the Board declines to adopt this portion of the proposed decision.

DISCUSSION

The District's statement of exceptions was filed prior to the appellate court's rulings in South Bay Union School District v. PERB/Southwest Teachers Association, CTA/NEA (1991) 228 Cal.App.3d 502 (South Bay) and Mt. Diablo Unified School District (1990) PERB Decision No. 844, review den.[3] In South Bay, the court upheld PERB's ruling that an employee association has a statutory right to file grievances in its own name, and that this issue is not a mandatory subject of bargaining. PERB also addressed this issue in Chula Vista City School District (1990) PERB Decision No. 834 (Chula Vista). In Chula Vista, the Board held the Association has a statutory right to present grievances in its own name, and that this is a nonmandatory subject of bargaining. Further, the Board held that once the Association took a firm position that the District's proposal limiting its right to file grievances not be included in the contract, the District's continued insistence on the proposal was a per se violation of the duty to bargain in good faith and the duty to participate in good faith in the impasse procedures.

In its exceptions, the District argues that Chula Vista and South Bay were incorrectly decided and urges the Board to reconsider its rulings on this issue. As the ALJ's analysis comports with the rulings of the Board and the appellate court on the right of an association to file grievances in its own name,

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[3]On July 11, 1991, the District's Petition for Writ of Review with the California Supreme Court was denied.

the Board declines to accept the District's invitation to hold otherwise here.

The District also argues that the Association's failure to inform the District, prior to impasse, that it refused to bargain on this subject by removing it from the bargaining table, is fatal to its claim. The District claims the Association maintained its bargaining position (rather than withdrawing the subject) up to impasse and until the final mediation session. The District asserts that as long as a union continues to insist on placing language in the contract, it cannot be found to have withdrawn the subject from the table, citing Lake Elsinore School District (1986) PERB Decision No. 603. Thus, the District argues that it did not insist to impasse that the Association waive its statutory rights.

The facts of this case are very similar to those of Chula Vista. In Chula Vista, the parties reached impasse with the Association continuing to propose changes to the restrictive grievance language, and the District insisting on maintenance of the status quo. While the Association did not explicitly state that the proposals in question were "outside the scope of bargaining," the Association did make clear its contention that it was improper for the District to insist on language which it believed deprived it of its statutory rights. The Board found in Chula Vista, that "the Association's statements [were] sufficient to put the District on notice that the Association was unwilling

to waive its statutory right to represent its members." (Chula Vista, p. 26.)

Similarly in this case, the District continued to insist on maintenance of the status quo throughout negotiations and impasse. The Association continued to refuse to waive its statutory rights, while at the same time continuing to press for inclusion of its proposal in the agreement. The District's exceptions are, therefore, rejected.

ORDER

Based upon the foregoing and the entire record in this case it is found that the Travis Unified School District violated section 3543.5(b), (c) and (e) of the Educational Employment Relations Act. Pursuant to Government Code section 3541.5(c) it is hereby ORDERED that the Travis Unified School District, its officers and representatives shall:

A. CEASE AND DESIST FROM:

1. Insisting to impasse and during impasse on contractual language outside the scope of representation which has the effect of restricting the Association's right to file grievances on its own behalf.

2. Enforcing and giving effect to those portions of the 1988-90 collective bargaining agreement which restrict the Association's right to file and process grievances in its own name.

3. Interfering with the Association's right to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Accept and process grievances filed by the Association on behalf of individual unit members as appropriate under the time lines and subject matter requirements of the contract between the parties.

2. Accept and process requests for arbitration initiated by the Association on behalf of individual unit members, without requiring that a written request be made by the grievant(s) to the Association, as appropriate under the time line and subject matter requirements of the contract.

3. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations within the Travis Unified School District where notices to certificated employees are customarily placed, copies of the Notice attached hereto as an appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive work days. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accord with her instructions. Continue to report in writing to the Regional

Director thereafter as directed. All reports to the Regional Director shall be concurrently served on the charging party herein.

Chairperson Hesse and Member Camilli joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-1307, Travis Unified Teachers Association v. Travis Unified School District, in which all parties had the right to participate, it has been found that the Travis Unified School District violated the Educational Employment Relations Act (Act), Government Code section 3543.5(b), (c) and (e).

As a result of this conduct, we have been ordered to post this notice and we will:

A. CEASE AND DESIST FROM:

1. Insisting to impasse and during impasse on contractual language outside the scope of representation which has the effect of restricting the Association's right to file grievances on its own behalf.

2. Enforcing and giving effect to those portions of the 1988-90 collective bargaining agreement which restrict the Association's right to file and process grievances in its own name.

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B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Accept and process grievances filed by the Association on behalf of individual unit members as appropriate under the time lines and subject matter requirements of the contract between the parties.

2. Accept and process requests for arbitration initiated by the Association on behalf of individual unit members, without requiring that a written request be made by the grievant(s) to the Association, as appropriate under the time line and subject matter requirements of the contract.

Dated:_____ TRAVIS UNIFIED SCHOOL DISTRICT

By:_____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

TRAVIS UNIFIED TEACHERS ASSOCIATION, Charging Party, v. TRAVIS UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. SF-CE-1307 **PROPOSED DECISION** (9/21/90)

Appearances: Ramon E. Romero, Attorney, for Travis Unified Teachers Association; Littler, Mendelson, Fastiff & Tichy by Victor J. James, II, Attorney, for Travis Unified School District.

Before William P. Smith, Administrative Law Judge.

PROCEDURAL HISTORY

On or about March 30, 1989, the Travis Unified Teachers Association, (hereafter Association) filed an unfair practice charge against the Travis Unified School District (hereafter District) alleging that the District had insisted up to and through impasse on restrictions that would bar the Association from filing grievances in its own name on behalf of District employees.

On July 12, 1989, the General Counsel of the Public Employment Relations Board (hereafter PERB or Board) issued a complaint alleging that the District's conduct constituted a

violation of sections 3543.5(a) and (b)[1] of the Educational Employment Relations Act (hereafter EERA or Act).

On or about July 27, 1989, the District filed an answer to the unfair practice complaint alleging as affirmative defenses that the District's actions conformed to past practice and that the District's actions did not violate any rights under the EERA.

On October 11, 1989, pursuant to PERB Rule 32207 (Cal. Admin. Code, tit. 8, section 32207), the parties submitted a stipulated statement of facts in lieu of a hearing in this matter.

The parties submitted briefs on November 14, 1989.

On November 26 and December 7, 1989, the administrative law judge issued amendments to the complaint alleging that the

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[1]All section references, unless otherwise noted, are to the Government Code. EERA is codified at Government Code section 3540 et seq. Section 3543.5 reads in relevant part:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees or otherwise to interfere with, restrain or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> . . . . . .
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

District's conduct constituted a violation of sections 3543.5(c) and (e) of the EERA.

The parties were given until January 18, 1990, to file briefs in response to the amendments. On January 16, 1990, Respondent moved to dismiss the second amended complaint. Charging Party had until February 12, 1990, to file its response to the motion. On February 13, 1990, Charging Party requested to reopen the record and to amend the complaint by alleging violation of 3543.5(c) and 3543.5(e). Respondent was given until February 16, 1990, to request an opportunity to present additional evidence by hearing to the record in the case. On February 16 the parties requested and were granted an extension until February 23, 1990, to file the responses due on February 16, 1990. On March 21, 1990, the Motion to Dismiss the second amended complaint was denied, the Complaint as amended thus alleged violation of sections 3543.5(a), (b), (c) and (e), and the record was declared open to receive additional evidence from the parties in response to the amended complaint. A hearing was set for May 3, 1990. The parties submitted an amendment to the stipulation of facts in lieu of the hearing. The proposed amendment to the stipulation of facts is hereby admitted to the record as joint exhibit H. The parties were given until May 18 to file additional briefs. Briefs were filed and the matter was submitted on May 18, 1990.

STATEMENT OF FACTS

The Association is an employee organization and an exclusive representative of an appropriate unit of the District's certificated employees as defined by the Act. The District is a public school employer as defined by the Act.

The Association and the District have been parties to a series of collective bargaining agreements (hereafter MOU). One of those agreements was effective by its terms from July 1, 1985, through June 30, 1988.

Article 6 of the 1985-88 collective bargaining agreement is entitled "Grievance Procedure" and defines a "grievance" as follows:

> Grievance shall mean a complaint by an employee or group of employees that there has been to him/her (or them) a violation of inequitable application of any provisions of the Agreement.

During negotiations for the 1985-88 bargaining agreement the Association submitted a proposal to include the Association's right to grieve and binding arbitration. The parties did not agree to include either of the provisions in the 1985-88 bargaining agreement.

During the spring of 1988, the Association and the District commenced negotiations to reach agreement upon a collective bargaining agreement to succeed the 1985-88 agreement. The Association made its initial proposal on or about February 9, 1988, and the District made its initial proposal on or about March 8, 1988.

In its initial proposal, the Association proposed that a "grievance" under the successor collective bargaining agreement be redefined as follows:

> Grievance shall mean a complaint by one or more teachers or the Association that there has been to him/her (or them) a violation of inequitable application of any provisions of the Agreement.

In its initial proposal, the District proposed that there be no change in the definition of a "grievance" from the 1985-88 agreement to the successor agreement.

The parties' face-to-face successor contract negotiations continued through the spring and summer of 1988 with the parties meeting on approximately fifteen different dates. The sessions alternated between "full day" and "half day" sessions. When negotiations occurred on the full day schedule, the sessions would start between 7:00 a.m. and 8:30 a.m., and would stop approximately 4:30 p.m. When negotiations occurred on the half day schedule, the parties would start at 12:00 noon and stop at approximately 5:00 p.m. The Association insisted on starting and stopping the negotiation sessions as indicated above.

The question whether the Association would have the right to grieve was discussed at approximately five of those negotiations sessions. Throughout those negotiations the parties maintained their respective positions as described in the paragraphs above. The Association steadfastly maintained in both its oral and written communications that it had a right to enforce the collective bargaining agreement by filing a grievance

in its own name with or without identifying a member of the bargaining unit as the person whose contract rights were involved. On the other hand, the District steadfastly maintained in both its oral and written communications its right to maintain the existing definition of a grievance and did not agree to the Association's proposal which would allow it to file a grievance in its own name.

During the negotiation session occurring on May 5, 1988, the District's team, in response to the Association's proposals to include the right to initiate grievances, offered to include a specific reference to Government Code section 3543.2[2] in the agreement with the proviso that the parties would agree that the grievance process would be governed by it.

The parties currently dispute what the District explained as further rationale for its verbal offer. The Association contends that, upon inquiry by its negotiating representatives, the District's team explained that, because administrative law judge decisions were not precedential and the Association's right to initiate grievances under section 3543.2 had not been decided by the PERB, the effect of the District's proposal would be to require the Association and the District to go to court to enforce the collective bargaining agreement. The District contends that, upon inquiry by the Association's negotiating representatives, the District explained that because ALJ decisions were not precedential and the Association's right to

[2]See fn.6, infra, p.14.

initiate grievances under section 3543.2 had not been decided by the PERB, the effect of the District's proposal would be to require the Association and the District to abide by the court's decision once made.[3]

The parties agree that the Association rejected the District's proposal and continued to insist on its own proposal.

On or about October 3, 1988, the parties filed with the PERB's San Francisco Regional Office a joint request for impasse determination and appointment of a mediator.

In the request, the parties certified that:

> The parties have met in good faith. We have exchanged proposals and counter-proposals on all issues.
>
> In addition to the formal negotiations, the parties have met in private sessions and fully discussed "settlement potential" in each article. We have to date been unable to fashion any settlement.

During the negotiation session occurring on October 20, 1988, the District agreed, in principle, to that part of the Association's proposal which asked for binding arbitration. On that day, the parties agreed that the Association would draft the language of the provision. Thereafter, the Association drafted the language of the provision and tentative agreement was reached on December 13, 1988, with the understanding that the District refused to agree that the Association could file a grievance in its own name to enforce the collective bargaining agreement.

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[3]It is unnecessary to resolve this difference as to alleged facts because it is irrelevant to the decision here.

On October 26, 1988, the PERB declared that the parties' successor contract negotiations were in fact at an impasse and appointed a mediator to assist the parties in reaching agreement. The parties maintained their respective positions described in preceding paragraphs through the PERB's declaration of impasse.

During the time period from October through December of 1988, the parties met with the PERB-appointed mediator on one occasion in an attempt to reach agreement upon a complete successor contract.

During both face-to-face negotiations and the mediation session, the parties maintained their positions regarding the Association's proposal to grieve as described above. During the face-to-face negotiations session held on or about May 5, 1988, and the mediation session held on or about November 3, 1988, Association representative Ben Ridlon stated that the Association wanted the right to be a named grievant under the successor collective bargaining agreement because it wanted to be able to file a grievance to enforce the successor agreement in two kinds of situations it had encountered in the past: (1) when a bargaining unit member refused to file a grievance to enforce the contract as it was being applied to him or her; and (2) when a bargaining unit member was afraid to be named as a grievant for fear of reprisals for filing a grievance. On both occasions, the District's representative Todd De Mitchell asked for examples of affected employees and the Association provided none. On both occasions, Ben Ridlon refused to waive the Association's demand

to be a grievant and stated that the District's refusal to agree to the Association's definition of a grievant under the successor contract was a violation of the Educational Employment Relations Act. Dr. De Mitchell responded to the Association by explaining that the PERB decisions on this issue were ALJ decisions and thus not precedential.

On or about November 3, 1988, Association President Patty Chavez delivered to the District a letter stating the Association's refusal to waive its demand to file a grievance in its own name.[4]

On or about December 12 or 13, 1988, the parties reached agreement on all other parts of their successor collective bargaining agreement including the provision allowing for binding

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[4]The letter stated:

> To Management:
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> As verbally stated in Negotiations on several occasions including November 2, 1988, the Association has proposed and will not relinquish its demand to have the right under the Educational Employment Relations Act to enforce any agreement made between the employees in our Collective Bargaining Unit and the Travis Unified School District.
>
> Since the employer refuses to grant this right and has insisted to impasse language which would deny the Association its right to enforce its contract through the grievance process, the Association is notifying the District that we will settle the rest of our Contract issues and file the appropriate Unfair Labor Practice charge with the Public Employee [sic] Relations Board on this matter.

arbitration. The grievance and arbitration provisions of the successor collective bargaining agreement state in relevant part:

> 6.11 Grievance
>
> Grievance shall mean a complaint by an employee or group of employees that there has been to him/her (or them) a violation of inequitable application of any provisions of the Agreement.
>
> 6.12 Aggrieved Person
>
> An Aggrieved Person is the person making the claim.
>
> 6.13 A Party in Interest
>
> A Party in Interest is the person making the claim and any person who might be required to take action or against whom action might be taken in order to resolve the claim.
>
> . . . . . .
>
> 6.35 Level 3 - Binding Arbitration
>
> (a) If the aggrieved person is not satisfied with disposition of grievance at Level 2 . . . the grievant may . . . request in writing to the Association that the grievance be submitted to binding arbitration. The Association shall retain the right to determine which grievances may proceed to arbitration. . . .
>
> . . . . . .
>
> (c) The arbitrator . . . shall issue an award . . . on issues are [sic] submitted to him. The arbitrator's recommendation shall set forth his findings of fact, reasoning, and conclusions on issues submitted.
>
> 6.36 Award of the Arbitrator
>
> The award of the arbitrator shall be binding upon the Association and the Board. . . .

LEGAL ISSUES

1. Did the District fail to meet and negotiate in good faith by insisting to impasse that the Association agree to contractual provision limiting the Association's right to file and process grievances on behalf of individual unit members?

2. Did the District fail to participate in the impasse procedures in good faith by insisting during mediation that the Association agree to contractual provision limiting the Association's right to file and process grievances on behalf of individual union members?

3. Did the District, by the conduct described in paragraphs one and two, interfere with employees' rights guaranteed by the EERA?

4. Did the District's conduct, as described in paragraphs one and two, constitute a denial of the rights of the Association?

Amendment to Complaint

Charging Party's motion to amend the complaint to allege Respondent's violation of sections 3543.5(c) and (e) of the Act, while arguably unnecessary, is granted.[5] It is arguably unnecessary, therefore, to decide whether, as the Respondent urges, the administrative law judge lacks authority to initiate such an amendment in the course of processing the case.

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[5]This is in accord with the Order to Amend the Complaint previously issued sua sponte by this ALJ on November 26 and December 7, 1989.

The administrative law judge, as Board agent, is responsible for processing the complaint through hearing to a proposed decision. The ALJ has the responsibility to provide an evidentiary hearing to the parties and apply the appropriate law to the facts.

The regulations directing the ALJ's conduct of the hearing process are appropriately sparse. In the absence of specific directions on a subject, the regulations necessarily contemplate wise application by analogy of due process principles established by the California Civil Code of Procedure and the courts. A judge, in trying a civil complaint concerning a transportation rate case, has authority to order an amendment to the complaint sua sponte appropriate to the evidence before him, in the public interest. See R.E. Tharp, Inc. v. Miller Hay Co. (1968) 261 Cal.App. 2d 81, 86 [67 Cal.Rptr. 854]. The court found that the enforcement of the rate structures set by the California Public Utilities Commission was sufficient public interest to justify a special case exception to the general rule (i.e., that a judge has no obligation to amend the pleadings absent a party's motion).

> . . . The opinion concludes that the public policy supporting the rate regulations and the orders of the Commission "overshadows the purpose for adhering to strict rules of pleading and imposed on the trial judge, in the instant case, the duty to order an appropriate amendment to plaintiff's pleadings after he sustained defendant's objections." (261 C.A.2d 86.)
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> 5 Whitkin, California Procedure (3d ed. 1985), Court's Duty to Order Amendment, sec. 1141, p. 557.

A similar public interest applies to this case by analogy.

All parties were given opportunity to add to the record additional facts in support and/or defense of the complaint as amended and to submit additional briefs. Therefore, no prejudice to either party results from the amendment.

DISCUSSION

The District's Conduct as a Violation of Section 3543.5(c)

Failure to Negotiate

Public school employers have a duty under section 3543.3 to "meet and negotiate with . . . representatives of employee organizations selected as exclusive representatives of appropriate units . . . ." Failure to meet and negotiate in good faith with an exclusive representative is an unfair practice and a violation of EERA section 3543.5(c). The obligation to negotiate is bilateral. Section 3543.6(c) places the reciprocal duty on the exclusive representatives. The obligation is not unlimited, however, and extends only to "matters relating to wages, hours of employment, and other terms and conditions of

employment."[6] Subjects within the scope of section 3543.2 are commonly referred to as mandatory subjects of negotiation.

Subjects outside the scope of section 3543.2 are not mandatory (nonmandatory) subjects of negotiations.

The District has attempted to limit the Association's right to file grievances in its own name by insisting to impasse as well as throughout impasse that the Association agree to a provision that would deny it this right without the employer's consent. This subject is a nonmandatory subject of negotiations. Chula Vista City School District (1990) PERB Decision No. 834 and South Bay Union School District (1990) PERB Decision No. 791. See also Marine and Shipbuilding Workers v. NLRB (3 Cir. 1963) 320 F.2d 615 [53 LRRM 2878] and NLRB v. Wooster Div. of Borg-Warner Corp. (1958) 356 U.S. 342 [42 LRRM 2034].

When a party refuses to negotiate about a nonmandatory subject, it is an unfair practice per se for the other party to

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[6]The scope of representation under the EERA is set forth at section 3543.2 which, in relevant part, provides as follows:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be issued for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. . . .

insist to impasse upon inclusion of that subject in the agreement. The Board has held that insistence to impasse on a nonmandatory subject of negotiations is a per se violation of the Act. Lake Elsinore School District (1986) PERB Decision No. 603.

There is no dispute between the parties that proposals containing limitations on the Association's right to file grievances in its own name or to initiate an arbitration procedure are a nonmandatory subject of bargaining. The Board recognized the distinction between a permissive subject of bargaining and a nonmandatory subject. See Chula Vista City School District, supra and South Bay Union School District (1990) PERB Decision No. 791. [7]

The District argues that the Association, not the District, proposed the subject of a modification to the existing contractual grievance procedure to expressly recognize the Association's rights to initiate the processing of a grievance and proceed to arbitration without an employee's written consent.

The Association did initiate the proposal, but the District's response was maintenance of the "status quo." This was, in fact, a counter proposal that proposed that such restrictions continue in a successor contract. The fact that the parties reached an agreement as to a previous contract that contained such restrictions indicates nothing more than the permissive nature of the provisions as a subject of bargaining.

[7]See also South Bay Union School District (1990) PERB Decision No. 791(a).

But, the facts before us have established that the Association was no longer agreeable to the maintenance of such limitations in the contract. Its proposal on the subject, while the first proposal on the subject between the parties during these negotiations, was an appropriate means of indicating to the District that it no longer wished to continue with the maintenance of the previous limitations. Both parties were free to deal with the subject on a proposal and counter-proposal basis as long as both were willing. However, once the parties reached an impasse in the negotiations the District's proposal on the subject still on the table became one of the impediments to the parties reaching an agreement.

It was no less an attempt by the District to coerce agreement to a limitation on a nonmandatory subject because it was phrased in the collective bargaining short hand of the bargaining table as "maintenance of the status quo", or because the Association had first broached the subject by initiation of a proposal on the nonmandatory subject.

The Association correctly claims the EERA specifically grants it the right to represent its members.[8] Moreover, it also

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[8]In relevant part, section 3543.1(a) provides as follows:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their

possesses as a significant aspect of its status as exclusive representative the right to file grievances on behalf of all unit members. This right, which the Association finds in several federal cases, is in addition to the statutory right to represent its members. (See section 3543.l(a) fn. 8, supra, p. 16.)

The District continued its insistence on the disputed grievance language during the mediation process. Thus, the Association, in order to reach an agreement, was forced to accept the District's limitation on the nonmandatory subject.

Before the parties reached agreement, the Association gave notice by its letter of November 3, 1989, to the District that it intended to pursue the dispute through an unfair practice charge. The District, was clearly aware of the Association's position on this as a nonmandatory subject from the discussions between the parties during the negotiations on their respective proposals and from the Association's letter. Thus, the dispute was kept alive despite the parties subsequently reaching agreement on a new MOU containing the previous limitations on the Association's rights.

The Association is found to have executed the agreement under the duress of the District's maintenance of an unlawful position during negotiations to impasse on a nonmandatory subject.

The District's conduct here is not appreciably different from that found unlawful in the Chula Vista and South Bay

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> employment relations with the public school employer. . . .

Association cases. Here, as in South Bay, the Association reluctantly accepted contract language limiting its right to file grievances in its own name. From the beginning of the negotiations process, the Association repeatedly maintained its rights through proposals and through discussions. The District continued to insist on the restrictions. That the Association finally withdrew its language as one way to achieve an overall contract does not change the fact that the Respondent persisted with its proposal for limitation on the Association's rights to represent employees on the language to the end. Consistent with the Chula Vista and South Bay cases, this conduct by the Association cannot be regarded as a waiver.[9] It would also be unreasonable to conclude from this record that the District merely proposed, but did not insist upon, that nonmandatory subject.

Both parties joined in a request on October 3, 1988, to the Public Employment Relations Board that it find the negotiations had reached impasse which stated:

> The parties have met in good faith . . . .

The Respondent urges that the wording of this jointly certified request should be conclusive, or at least indicative,

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[9]The existence of the parties' agreement on a nonmandatory subject in previous contracts does not amount to a waiver of the Association's right to refuse to bargain away its right to file grievances in the future. In South Bay Union School District (1990) PERB Decision No. 791a, at p. 5, the Board rejected a similar contention, stating that the parties' past bargaining history - suggesting that similar restrictions were treated as part of the grievance procedure - was irrelevant.

that the Respondent negotiated in good faith as required by section 3543.5(c). This statement is a legal conclusion and as such, is one for the ALJ to make. The parties' conclusion on the subject is not binding on or useful to the Administrative Law Judge. The fact that the Association joined in such a statement, routinely it may be presumed, in order to move the negotiations to the mediation stage is little or no useful evidence as to the legal conclusion herein nor, since it was made for a different administrative purpose, is there reason to find the Association bound by it in this proceeding.

During the exchange of proposals on the subject, the District on May 5, 1988, offered to incorporate section 3543.2 into the contract and be bound by precedential decisions dispositive of that section.[10] This proposal, while it may have been well intended by the District, does not change the fact that a party's maintenance of a proposal on a nonmandatory subject of bargaining over the other party's objection to the proposal, does so at their peril. This is easily distinguished from the case where both parties mutually agree to a provision bound by future court or board precedent.

At the point of impasse, the grievance dispute was one, although not the only, subject preventing the parties from reaching agreement on a new contract.

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[10]At the time the proposal was made, Chula Vista City School District, supra and South Bay Union School District, supra, had not been issued.

It was, however, significant because maintenance of the position of the District to impasse was a per se violation of its duty to negotiate. The District, by its insistence to impasse on clauses which would restrict the Association's ability to file and arbitrate grievances, a subject outside the scope of representation, has failed to meet and negotiate in good faith in violation of EERA section 3543.5(c).

The 3543.5(b) Charge

A failure to participate in good faith in the impasse procedures, like a failure to negotiate in good faith, interferes with an exclusive representative's right to represent its unit members in the collective bargaining arena. Compton Community College District (1989) PERB Decision No. 720, at p. 24; San Francisco Community College District (1988) PERB Decision No. 703, at p. 7. Accordingly, the District violated EERA section 3543.5(b) by its conduct during negotiations to impasse.

The 3543.5(e) Charge

During the mediation process, the grievance dispute remained one, although not the only, subject obstructing the parties from reaching agreement on a contract. It is found that the District, because it maintained in its proposal the clauses which would restrict the Association's ability to file and to arbitrate grievances throughout the statutory impasse procedure, failed to participate in the impasse resolution procedure in good faith, a violation of section 3543.5(e). See generally Moreno Valley

Unified School District v. PERB (1983) 142 Cal.App.3d 191 [191 Cal. Rptr. 60].

The 3543.5(a) Charge

A failure to negotiate in good faith constitutes a derivative violation of EERA section 3543.5(b) but it is not a derivative violation of 3543.5(a). While there is direct evidence of a violation of 3543.5(b),[11] there is no evidence to support a finding the District committed an independent violation of 3543(a).

For these reasons and on the basis of the entire record, the contention that the District violated EERA section 3543.5(a) by insisting over the Association's objections on an MOU containing a provision which purports to limit the Association's right to initiate a grievance is dismissed.

REMEDY

The Charging Party seeks an order requiring the District to cease and desist from its unlawful conduct and to delete from the current bargaining agreement between the Association and the District the offending provisions. The PERB in section 3541.5(c) is given:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

[11]See pp. 19-20, supra.

A cease and desist order directing the District to stop its unlawful conduct is appropriate in this case. It also is appropriate to order the District to accept grievances filed by the Association on behalf of individuals as well as grievances designed to protect Association rights. It similarly is appropriate to order that the Association be permitted to file requests for arbitration without the specific authorization of individual unit members. These remedies will achieve the purposes sought by the Association without the additional order that certain clauses be struck from the contract between the parties. The purpose of the remedy is to insure that the clauses are no longer enforced.

It also is appropriate that the District be directed to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized representative of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and the District's readiness to comply with the order remedy. Davis Unified School District, et al. (1980) PERB Decision No. 116. See also Placerville Union School District (1978) PERB Decision No. 69.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is found that the Travis

Unified School District has violated sections 3543.5(b), (c) and (e) of the Educational Employment Relations Act. Pursuant to section 3541.5(c) and (e) of the Government Code, it hereby is ORDERED that the Travis Unified School District, its officers and representatives shall:

A. CEASE AND DESIST FROM:

1. Insisting to impasse and during impasse on contractual language outside the scope of representation which has the effect of restricting the Association's right to file grievances on its own behalf.

2. Enforcing and giving effect to those portions of the 1988-90 collective bargaining agreement which restrict the Association's right to file and process grievances in its own name.

3. Interfering with the Association's right to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Accept and process grievances filed by the Association on behalf of individual unit members as appropriate under the time lines and subject matter requirements of the contract between the parties.

2. Accept and process requests for arbitration initiated by the Association on behalf of individual unit members, without requiring that a written request be made by the

grievant(s) to the Association, as appropriate under the time line and subject matter requirements of the contract.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations within the Travis Unified School District where notices to certificated employees customarily are posted, copies of the Notice attached hereto as an appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

4. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board and accord with the director's instructions.

All other allegations in Unfair Practice Charge No. SF-CE-1307 and companion complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any,

relied upon for such exceptions. See California Administrative Code, title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." See California Administrative Code, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, sections 32300, 32305 and 32140.

DATED: September 21, 1990

William P. Smith
Administrative Law Judge